

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JOYCE MATTUCCI)	
Claimant)	
VS.)	
)	Docket Nos. 213,286 & 225,025
WESTERN STAFF SERVICES and)	
HOBBY LOBBY)	
Respondents)	
AND)	
)	
TRAVELERS INSURANCE COMPANY and)	
CNA INSURANCE COMPANIES)	
Insurance Carriers)	

ORDER

Claimant and respondent Western Staff Services appeal from an Award entered by Administrative Law Judge Jon L. Frobish on September 16, 1998. The Appeals Board heard oral argument April 9, 1999.

APPEARANCES

Stephen J. Jones of Wichita, Kansas, appeared on behalf of claimant. William L. Townsley, III, of Wichita, Kansas, appeared on behalf of respondent Western Staff Services and its insurance carrier, Travelers Insurance Company. D. Steven Marsh of Wichita, Kansas, appeared on behalf of respondent Hobby Lobby and its insurance carrier, CNA Insurance Companies.

RECORD AND STIPULATIONS

The Appeals Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

In April 1996, claimant injured her right upper extremity while working for Western Staff Services (Western). In November 1996, claimant settled her claim for that injury

(Docket No. 213,286) based on a 32 percent loss of use of the right forearm. Claimant left employment for Western in May 1996. She began working for Hobby Lobby in May 1997.

Claimant has now filed a new claim against Hobby Lobby (Docket No. 225,025) contending she has disability in her left upper extremity as well as additional disability in her right upper extremity resulting from her work at Hobby Lobby. In the alternative, she has filed an application for review and modification of the original claim against Western, taking the position that the additional disability is a natural and direct consequence of the injury at Western.

The ALJ found that claimant has not proven she has any additional disability. He further found that her current complaints are a result of the original injury at Western. Based on those findings, he granted claimant's request for additional medical treatment, ordered Western and its insurance carrier to provide that treatment, and denied claimant's request for additional permanent disability benefits.

The issues on appeal are:

1. Has claimant's disability increased since the settlement in November 1996?
2. If so, is claimant entitled to review and modify the settlement award in Docket No. 213,286?
3. In the alternative, is the increased disability attributable to work activities in claimant's later employment with Hobby Lobby?

If the Board concludes claimant is entitled to additional permanent disability benefits, the nature and extent of claimant's current disability will also be at issue. If the permanent disability is determined to be from work at Hobby Lobby, claimant's average weekly wage at Hobby Lobby will also be an issue.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record and considering the arguments, the Appeals Board finds the Award should be reversed to an award against Hobby Lobby based on 5 percent disability to the right upper extremity.

Findings of Fact

1. On November 14, 1996, claimant settled a claim against respondent Western. The settlement was for injury in April 1996 to claimant's right upper extremity and was based on 32 percent impairment of the right upper extremity given by the treating physician,

Dr. J. Stanley Jones. The settlement agreement left open claimant's right to further medical treatment.

2. Dr. Jones had diagnosed, before the settlement, tenosynovitis or overuse syndrome on the right upper extremity. An EMG showed mild compression of the median nerve at the wrist and ulnar nerve at the elbow. Although he considered carpal tunnel syndrome as a possible diagnosis, he did not diagnose carpal tunnel syndrome because the Phalen's and Tinel's tests were negative.

3. Claimant left work for Western in May 1996 and did not work again until she began working for respondent Hobby Lobby in May 1997.

4. After the settlement and before claimant began working for Hobby Lobby, claimant continued to see Dr. Jones, primarily for complaints to the right upper extremity. She also complained of problems in her left hand but Dr. Jones did not treat the left hand. In April 1997, Dr. Jones stopped seeing claimant after claimant made threats because Dr. Jones did not prescribe pain medication as requested. Dr. Jones did not change his diagnosis from the original tenosynovitis.

5. From May 31, 1997, to June 25, 1997, claimant worked for respondent Hobby Lobby as a cashier operating a manual key-in type register. According to claimant, the work made the problems in her right hand worse. When she compensated for problems in the right hand, she began developing problems in the left hand. She also developed problems in her right shoulder and right elbow.

6. On June 19, 1997, while working for Hobby Lobby, claimant went to Dr. J. Mark Melhorn. She complained only of problems with her right upper extremity, told Dr. Melhorn the problems began in April 1996, and told him she worked for Western. She did not, at the time of the initial visit, mention her left upper extremity and did not mention that she was working for Hobby Lobby.

7. Dr. Melhorn continued to treat claimant and on October 27, 1997, Dr. Melhorn performed a right carpal tunnel release and right ulnar nerve decompression at the elbow. Dr. Melhorn continued to treat claimant through early 1998.

8. Dr. Melhorn concluded that claimant's work at Hobby Lobby had caused additional injury to claimant's right upper extremity. He reached this conclusion even though he knew she had worked only a short period of time at Hobby Lobby. Although claimant complained to him of problems on the left as well as the right and complained of shoulder problems, Dr. Melhorn provided an impairment rating only for the right upper extremity. He rated that impairment as 9.5 percent. He attributed 50 percent of that impairment to work at Hobby Lobby, 30 percent to work at Western, and 20 percent to her personal hobby of arranging flowers. As to the left upper extremity and bilateral shoulder complaints, Dr. Melhorn testified he found nothing to substantiate her complaints or support a rating.

Dr. Melhorn also recommended restrictions. He indicated she should be limited to the light/medium category of work with a 35-pound maximum lift/carry restriction and a 20-pound frequent limit. He also recommended task rotation.

9. Claimant's condition was evaluated by Dr. Pedro A. Murati in February 1998. Dr. Murati diagnosed status post right carpal tunnel release and right ulnar nerve release at the elbow. He also diagnosed left ulnar cubital tunnel syndrome, possible left carpal tunnel syndrome, and bilateral shoulder strain. He rated the impairment as 7.5 percent of the whole body. This 7.5 percent was the percentage of disability he attributed to the work at Hobby Lobby. He assigned additional disability to the work at Western and the flower arranging claimant did as a hobby. The 7.5 percent rating included impairment to the right upper extremity which Dr. Murati attributed to the work at Hobby Lobby.

10. In February 1998, claimant went to work at Esther's Flower Shop earning a wage which was more than 90 percent of the wage she was earning at the time of the injury. Claimant is not asking for work disability to be awarded. She asks for a general body disability based on functional impairment.

11. Claimant has provided inconsistent testimony regarding the onset of symptoms in her right and left upper extremities.

Conclusions of Law

1. Claimant has the burden of proving his/her right to an award of compensation and of proving the various conditions on which that right depends. K.S.A. 44-501(a).

2. The Board concludes claimant has proven she suffered additional impairment to the right upper extremity from work at Hobby Lobby but not to the shoulders or left upper extremity. The conclusion that claimant has not proven impairment to the left upper extremity or shoulders is based in part on the testimony of Dr. Melhorn who found impairment to the right upper extremity only. The conclusion is also based in part on the fact claimant has given inconsistent testimony and thereby reduced the weight which might otherwise be given to her testimony.

Although she has also given inconsistent testimony regarding the right upper extremity, the injury to the right upper extremity is, in our opinion, supported and established by the medical testimony. Dr. Jones diagnosed tenosynovitis. After working for Hobby Lobby, the diagnosis changed to carpal tunnel syndrome and ulnar nerve compression at the elbow.

Dr. Melhorn and Dr. Murati both identified additional impairment from the work at Hobby Lobby. Dr. Melhorn, in particular, testified to additional impairment to the right upper extremity from work at Hobby Lobby even though he knew she had worked there only a brief time and knew claimant spent time arranging flowers as a hobby.

The Board acknowledges that it originally affirmed the decision to deny preliminary hearing benefits for the right upper extremity based on a finding that Dr. Melhorn's opinion, then only in report form, was based on a faulty history. But it appears to the Board that at the time Dr. Melhorn testified he was more fully, adequately if perhaps still not completely, informed of the history. Dr. Melhorn's opinion that work at Hobby Lobby increased the impairment is also supported by Dr. Murati and the fact the condition worsened to the point it required surgery. For these reasons, the Board now concludes the evidence supports the conclusion that the work at Hobby Lobby caused some worsening, permanent in nature, to the right upper extremity.

3. The Board concludes claimant suffered an additional 5 percent impairment to her right upper extremity as a result of work at Hobby Lobby, but she has failed to meet her burden to prove any other disability attributable either to the work at Hobby Lobby or to the original injury while working at Western. The 5 percent is based on the testimony of Dr. Melhorn. He found a total of 9.5 percent but attributed only one-half of that to the work at Hobby Lobby.

4. The ALJ based his decision to deny benefits in this case in part on the fact that claimant settled a prior claim for impairment to the right upper extremity for a higher percentage than the medical testimony supports in this case. The prior claim was settled on the basis of a 32 percent impairment. The Board does not agree that fact precludes an award in this case even though the current ratings are less than 32 percent. First, a settlement is a compromise between the parties which may take into consideration any number of factors including some unrelated to the actual nature and extent of disability. Second, ratings may be based on different criteria. The evidence in this case, the evidence upon which the Board must rely, shows disability from the work at Hobby Lobby over and above the disability from the injury at Western.

5. Claimant was hired to work 40 hours per week at Hobby Lobby for \$5.25 per hour. Although she did not actually work that number of hours she should be treated as a full-time employee. K.S.A. 44-511. The Board therefore finds her average weekly wage was \$210 per week.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award entered by Administrative Law Judge Jon L. Frobish on September 16, 1998, should be, and the same is hereby, reversed.

WHEREFORE AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Joyce Mattucci, and against the respondent, Hobby Lobby, and its insurance carrier, CNA Insurance Companies, for an accidental injury which occurred June 25, 1997, and based upon an

average weekly wage of \$210, for 10.5 weeks at the rate of \$140.01 per week or \$1,470.11, for a 5% permanent partial disability of the right upper extremity, all of which is presently due and owing in one lump sum less amounts previously paid.

Attorney fees are awarded in Docket No. 225,025 in accordance with K.S.A. 44-536(a).

Future medical expenses are ordered upon application to and approval by the Director.

The fees necessary for administration of the Workers Compensation Act, as listed in the Award by the Administrative Law Judge, are hereby assessed against Hobby Lobby and its insurance carrier.

The Appeals Board also approves and adopts all other orders entered by the Award not inconsistent herewith.

IT IS SO ORDERED.

Dated this ____ day of May 1999.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stephen J. Jones, Wichita, KS
William L. Townsley, III, Wichita, KS
D. Steven Marsh, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director